

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MILES D.,

Claimant,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2011040534

DECISION

Howard W. Cohen, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 7, 2011, in Culver City.

Miles D. (claimant) was not present; he was represented by his mother, Cammy D.¹

Lisa Basiri, Fair Hearing Coordinator, represented Westside Regional Center (WRC or Service Agency).

Oral and documentary evidence was received, the record was closed, and the matter was submitted for decision on June 7, 2011.

ISSUES

1. Whether the Service Agency may eliminate claimant's 14 hours per month of in-home respite at the sibling rate while increasing his in-home respite at the individual rate from 14 hours to 21 hours.

¹ Initials and family titles are used to protect the privacy of claimant and his family.

2. Whether the Service Agency may reduce claimant's specialized supervision from 105 hours per month to 48 hours per month.

EVIDENCE RELIED UPON

Documents: Service Agency's exhibits M-1 to M-12; claimant's exhibits M-A to M-C.

Testimony: Lisa Basiri; Cammy D.

FACTUAL FINDINGS

1. Claimant is a 10-year-old boy, born on July 27, 2001, who is a consumer of WRC based on his qualifying diagnosis of autism.

2. Claimant lives at home with his parents and his brother and sister; his brother is also a consumer of WRC's services. Claimant attends the Elliott Institute, a small non-public school for children with moderate to severe disabilities. He requires behavior intervention in the classroom; in a June 6, 2011, letter to the Service Agency, Eileen Tatevossian, M.A., Director of Behavior Services at Elliott Institute, wrote that claimant has severe sensory and behavioral needs, displays physical aggression, spits, dives on the ground, and puts inedible objects in his mouth. She wrote that "[i]t is a safety concern that [claimant] is unable to self-regulate when outside." (Ex. M-B.)

3. Under an Individual Program Plan (IPP) Addendum Agreement dated November 17, 2008, and signed by claimant's mother and claimant's service coordinator, claimant's IPP was changed to reflect, among other things, specialized supervision at the sibling rate for 44 hours per month from July 1, 2008, to September 30, 2009, and specialized supervision at the single rate for 6 hours per day for one month from July 1, 2008, dropping to three hours per day from October 1, 2008, to September 30, 2009. (Ex. M-8.)

4. In 2009, the Service Agency notified claimant's parents that it was suspending funding for "program respite services" for claimant at a swim school under Welfare and Institutions Code section 4648.5.² Claimant's parents filed a fair hearing request and, during the subsequent informal conference, discussed with Erica Reimer, M.A., WRC's Executive Director Designee, their need for respite services. By letter dated November 9, 2009, Ms. Reimer informed claimant's parents that WRC would not continue funding the swim school

² "Program respite" is a term that WRC uses to characterize a variety of services obtained through approved vendors; it does not necessarily refer to "respite services" as that term is defined in the Lanterman Developmental Disabilities Services Act (Lanterman Act).

services and offered WRC funding for 14 hours per month of in-home respite services at the individual hourly rate until July 30, 2010. Shortly thereafter, WRC and claimant's parents agreed that WRC would fund in-home respite services at the individual hourly rate from December 1, 2009, through November 30, 2010; respite services at the sibling rate were to expire on December 31, 2009. (Ex. M-5.)

5. Claimant's July 9, 2010, individual program plan (IPP), signed by claimant's mother, claimant's service coordinator, and a WRC supervisor, retained the individual-rate respite services timeframe, extended the sibling-rate respite services timeframe, and addressed the sibling-rate specialized supervision timeframe as follows:

Plan for WRC Supports:

2.2 WRC is funding 14 hours per month of in home respite via Premier, from 07/01/09 to 12/31/10 at the single rate. Fair hearing agreement. Services to continue per parents request and WRC service standards.

2.3 WRC is funding 14 hours per month of in home respite via Premier, from 07/01/09 to 11/30/10 at the sibling rate.

2.4 WRC is funding Specialized Supervision, Monday through Friday, 44 hours per month at a twin rate from 07/01/08 to 09/30/09 via Premier Healthcare.

(Ex. M-7.)

6. The July 2010 IPP states that claimant requires assistance for his daily care, that he requires frequent monitoring, that without supervision while bathing he may scald himself, that he needs assistance to complete "all toileting tasks," that his eating habits must be monitored, and that he communicates needs with gestures and is difficult to understand. It further states that:

[Claimant] requires constant supervision as he is not aware of the dangers in the home and/or in the community. His home continues to have locks on the doors and windows to prevent any fleeing or bolting. He has no concept of danger. [Claimant] will take advantage of the situation when someone is distracted by trying to escape when the doors or windows are open. . . .

At school [claimant] is easily distracted and must be continually prompted to finish a task. Socially [claimant] enjoys parallel play. Due to his language delay communication with his peers becomes difficult.

(Id.)

7. The July 2010 IPP does not specifically address claimant's specialized supervision at the individual rate. The most current purchase of service documentation reflects that claimant is authorized to receive funding for 105 hours of specialized supervision per month at the "sibling rate—split" from July 1, 2010, to April 30, 2011, and 63 hours of specialized supervision at the single rate during the same period. (Ex. M-6.) At hearing, the Service Agency was unable to identify the reasons for the past increases in claimant's sibling-rate specialized supervision hours from 44 per month to 105 per month.

8. A worksheet entitled "Specialized Supervision, Approved WRC Funding for Premier/Maxim/Cambrian," dated March 10, 2011, and signed by Mary Rollins, WRC's Director of Client Services, states that claimant requested 105 hours per month of specialized supervision, that parents are responsible for 57 hours per month, and that the maximum that WRC will fund is 48 hours per month. (Ex. M-3.) There was no evidence as to whether or when this document was sent to claimant's parents.

9. By Notice of Proposed Action (NOPA) dated March 29, 2011, and by letter dated March 24, 2011, WRC notified claimant's mother of its proposal to eliminate funding 14 hours per month in-home respite services at the sibling rate while increasing claimant's in-home respite services, at the individual rate of \$14.14 per hour, to 21 hours per month from 14 hours per month, effective May 1, 2011. In the NOPA, WRC wrote that "[C]laimant's needs do not exceed 21 hours of respite in accordance with WRC service standards." (Ex. M-2.) In the letter, WRC reiterated its decision regarding respite, and added the following:

WRC will reduce the hours authorized for specialized supervision from the current 105 hours per month to 48 hours per month. It appears that parental responsibility of 57 hours per month was not considered at the time the service was originally requested. Parental responsibility is in accordance with welfare institution code 4685©(6) [sic].

(*Id.*)

10. On or about April 8, 2011, claimant's parents submitted to WRC a Fair Hearing Request on claimant's behalf, appealing the proposed reduction in funding. The stated reason for the request was:

Circumvention of Claimant's right to due process and not following agency procedures. WRC has unilaterally changed material terms of the IPP without knowledge and have [sic] attempted to reduce needed services without taking into consideration needs of Consumer or amounts parents continue to spend on childcare and monitoring.

(Ex. M-2.)

11. WRC has continued to fund 28 hours of respite services for claimant per month, 14 hours at the individual rate and 14 hours at the sibling rate, as well as 105 hours of specialized supervision per month at the sibling rate, pending the decision in this matter.

12. By letter dated May 4, 2011, after an informal meeting on April 29, Mary E. Rollins of WRC notified claimant's parents that the Service Agency was upholding the decision to terminate 14 hours of in-home respite per month at the sibling rate, effective June 1, 2011, to fund 21 hours of in-home respite per month at the individual rate, and to fund 60 hours per month of specialized supervision for the month of June 2011 and 48 hours per month thereafter. The letter explained that:

The Lanterman legislation mandates the regional center to fund only those services that are above and beyond normal child rearing. . . . Using the California Department of Education's Child Care Survey based on the rates that the regional center pays parental responsibility is equivalent to fifty-seven (57) hours per month.

The letter also explained that, at the July 2010 IPP, funding had been approved only through December 2010 and not through June 30, 2011, because:

[w]hen the funding requests were submitted in July 2010 it was realized that excessive services were in place. In order to sort through what was appropriate funding and to not disrupt services without adequate notice it was decided to only fund through February 2011.

The letter advised claimant's parents to apply for protective supervision from In-Home Supportive Services (IHSS), and strongly recommended behavior intervention in the home. (Ex. M-4.)

13. Claimant's mother argued that the Service Agency has unilaterally changed the terms of the IPP without sufficient notice. She testified that the Service Agency has not assessed claimant since the July 2010 IPP and that due to his behavior claimant must be watched all the time. She and her husband have installed an alarm system to let them know when claimant runs out of the house; he has gotten into someone else's car and the police had to find him. She further testified that she has applied for IHSS and that her application is pending. Claimant's father stated by declaration that claimant requires constant supervision, he has destroyed household furniture and appliances, he has tantrums and is aggressive, and he attempts to leave the house. (Ex. M-A.)

DISCUSSION

Jurisdiction and Burden of Proof

1. The Lanterman Act governs this case. (Welf. & Inst. Code, § 4500 et seq.)³ An administrative “fair hearing” to determine the rights and obligations of the parties is available under the Lanterman Act. (§§ 4700-4716.) Claimant’s parents requested a fair hearing to appeal the Service Agency’s proposed reduction of funding for claimant’s sibling-rate in-home respite services and for specialized supervision. Jurisdiction in this case was thus established. (Factual Findings 9-11.)

2. The party asserting a claim generally has the burden of proof in administrative proceedings. (See, e.g., *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 789, fn. 9.) In this case, the Service Agency seeks to change the level of services. Therefore, the Service Agency bears the burden of proving, by a preponderance of the evidence, that its decision to reduce claimant’s in-home respite service hours is correct. (Evid. Code, § 115.)

Funding for Claimant’s Respite Services

3. The Lanterman Act acknowledges the state’s responsibility to provide services and supports for developmentally disabled individuals and their families. (§ 4501.) Regional centers, such as the Service Agency, play a critical role in the coordination and delivery of services and supports. (§ 4620 et seq.) Regional centers are responsible for developing and implementing IPPs, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (§§ 4646, 4646.5, 4647, and 4648.)

4. Section 4512, subdivision (b), provides, in pertinent part, that respite is one of the services that may be provided to consumers and their families. “In-home respite services” are defined in the Lanterman Act as “intermittent or regularly scheduled temporary nonmedical care and supervision provided in a client’s own home, for a regional center client who resides with a family member.” (§4690.2, subd. (a).) Subdivision (a) of section 4690.2 provides that respite services are designed to:

- (1) Assist family members in maintaining the client at home.
- (2) Provide appropriate care and supervision in maintaining the client at home.
- (3) Relieve family members from the constantly demanding responsibility of caring for the clients.

³ Statutory citations are to the Welfare and Institutions Code, unless otherwise stated.

(4) Attend to the client's basic self-help needs and other activities of daily living including interaction, socialization, and continuation of usual daily routines which would ordinarily be performed by family members.

5. Effective July 1, 2009, section 4686.5 was added to the Lanterman Act, limiting a regional center's ability to purchase respite care for the families of consumers. Among other things, section 4686.5 provides that "[a] regional center may only purchase respite services when the care and supervision needs of a consumer exceed that [sic] of an individual of the same age without developmental disabilities." (§ 4686.5, subd. (a)(1).)

6. When purchasing services and supports, a regional center must conform to its purchase-of-service guidelines. (4646.4, subd. (a)(1).) Those guidelines are to have been reviewed by the Department "to ensure compliance with statute and regulation." (§ 4434, subd. (d).) Reflecting the Department's interpretation of statute and regulation, the guidelines are not entitled to the deference given to a regulation but are rather entitled to a degree of deference dependent upon the circumstances in which the agency has exercised its expertise. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-15.) The Service Agency in this case relied on its service standards, and in particular on its Respite Guidelines, to justify the proposed reduction in respite hours. The guidelines provide that the Service Agency "may only purchase respite services when the care needs of the individual exceed those of a person of the same age without a developmental disability." (Ex. K-10). This language mirrors almost exactly the language of section 4686.5, subdivision (a)(1).

7. Applying its guidelines, the Service Agency concluded that claimant's care and supervision needs exceed those of a child of the same age without disabilities to the extent that only 21 hours per month of respite at the individual rate is sufficient. At hearing, however, the Service Agency did not provide evidence sufficient to demonstrate its grounds for arriving at that conclusion, while statements in the July 2010 IPP regarding claimant's needs, claimant's behavior at school, and testimony at hearing about claimant's behavior at home do not appear to support that conclusion. (Factual Findings 2-10.) The Service Agency has, therefore, failed to meet its burden to demonstrate that the reduction of respite hours is justified.

Funding for Claimant's Specialized Supervision

8. Sections 4512, subdivision (b), and 4685, subdivision (c)(1), provide, in pertinent part, that specialized supervision is among the services that may be provided to consumers and their families.⁴

⁴ What is termed "specialized supervision" is identified in the Lanterman Act as "day care."

9. According to WRC's service standards, specialized supervision may be provided to those who meet all of the following criteria: (1) alternative resources for supervision have been ruled out; (2) the individual resides in a single-parent household with one parent working or attending a vocational/educational program full-time, or a two-parent household with both parents working or attending a vocational/educational program full time; (3) the individual needs constant supervision or total support due to severe physical and/or medical challenges, or (4) the individual has severe behavior challenges that constitute a threat to the health and safety of the individual, to the safety of others in the environment, or a threat to property; and (5) other circumstances which the IPP team and regional center management deem qualify the individual for these services. "Normal parental responsibilities" will be considered in determining eligibility for specialized supervision. The regional center:

may pay only the cost of care that exceeds the cost of normally providing [specialized supervision] to a child without disabilities of the same age. The regional center may pay in excess of this amount *up to the vendored rate* when a family can demonstrate a financial need and when doing so will enable the child to remain in the family home.

(Ex. M-10; italics in original.) The language about costs closely tracks the language of section 4685, subdivision (c)(6).

10. Applying its guidelines, the Service Agency concluded that claimant's care and supervision needs exceed those of a child of the same age without disabilities to the extent that only 48 hours per month of specialized supervision is sufficient. At hearing, however, the Service Agency did not provide evidence sufficient to demonstrate its grounds for arriving at that conclusion, while statements in the July 2010 IPP regarding claimant's needs, evidence of claimant's behavior at school, and testimony and other evidence at hearing about claimant's behavior at home do not appear to support that conclusion. (Factual Findings 2-13.) The Service Agency has, therefore, failed to meet its burden to demonstrate that the reduction of specialized supervision hours is justified.

Notice Requirements and IHSS

11. Under the Lanterman Act, a regional center must give a consumer 30 days' notice prior to deciding, without the consumer's consent, to reduce, terminate, or change services set forth in an IPP. (§ 4710, subd. (a)(1).) Adequate notice must be in writing and include the specific law, regulation, or policy that supports the action. (§ 4701, subd. (d).) A consumer dissatisfied with the proposed action may then request a fair hearing. (§ 4710, subd. (a).) An administrative law judge's review of a proposed reduction of services is thus framed by the underlying notice provided by the regional center and the fair hearing request. The Service Agency provided adequate notice in this case that sibling-rate respite services were to terminate, that total respite hours were to decrease, and that specialized supervision hours were to decrease in accordance with service standards. (Factual Finding 6.)

12. Under the Lanterman Act, regional centers may not purchase services for their clients when those services can be provided by a generic agency, an agency that has a legal responsibility to serve members of the general public and that receives public funds for providing such services. (See §§ 4648, subd. (a)(8), 4659, 4646, subd. (d), 4646.4, subd. (a), 4646.5, subd. (a)(4), and 4647, subd. (a).) IHSS may be considered a generic resource when the approved IHSS service is consistent with a specific service need identified in the client's IPP; however, respite hours purchased by regional centers should be considered as an offset only when there is a clear determination by the interdisciplinary team that the specific IHSS services are meeting "the respite need as identified in the consumer's [IPP]." (§ 4686.5, subd. (a)(5); Service Agency's Respite Guidelines, at Ex. K-10.) Here, claimant's parents have applied for but have not yet received a determination regarding IHSS hours for claimant, so no determination could be made by the Service Agency that IHSS services will meet the respite and specialized supervision needs identified in claimant's IPP. The evidence, however, does not show that the Service Agency based its determination to reduce respite and specialized supervision hours on the availability of IHSS; the Service Agency simply recommended that claimant's parents pursue IHSS for protective supervision, which they are doing. (Factual Finding 9.)

LEGAL CONCLUSION

Cause was not established to eliminate claimant's 14 hours per month of in-home respite at the sibling rate while increasing his in-home respite at the individual rate from 14 hours to 21 hours. Further, cause was not established to reduce claimant's specialized supervision from 105 hours per month to 48 hours per month. (Factual Findings 1-13, and Discussion.)

ORDER

Claimant Miles D.'s appeal is granted.

DATE: August 2, 2011

HOWARD W. COHEN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.